89-1828

NO.

Supreme Court, U.S.
FILED
APR 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

TIMMY DALE GILTNER, LORI GILTNER AND
LIBERTY MUTUAL INSURANCE COMPANY
Petitioners

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether both the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit, have violated the federal constitutional doctrine of Separation of Powers between the legislative and judicial branches of the federal government? The Courts below absolved the United States from liability under the Federal Tort Claims Act (FTCA), 28 USC 1346(b), by expressly refusing to hold the United States **liable exactly like** a "private person under [state] law" notwithstanding the clear Congressional directive expressly set out in the FTCA.

Neither the District Court nor the Court of Appeals acknowledged the undeniable fact that their actions were in direct and irreconcilable conflict with **all** United States Supreme Court decisions and **all** other Federal Circuit Court decisions regarding the above application and interpretation of the FTCA.

LIST OF INTERESTED PARTIES

Timmy Dale Giltner and Lori Giltner
Plaintiffs - Petitioners

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United States of America
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TABLE OF CONTENTS

	PAGE NO.
Question Presented	i
List of Interested Parties	ii
Opinions Delivered in Courts Below	1
Jurisdiction of this Court	2
Constitutional Provisions and Statutes of the Case	3
Statement of the Case	
Course of Proceedings	4
Facts	5
Argument	7
Conclusion	13
Certificate and Verification	14
Appendix	
Ruling on Motion	A-1
Ruling on Motion for Summary Judgment	A-4
Opinion from the Fifth Circuit	A-6
Denial of Motion for En Banc Hearing	A-13
Supremacy Clause; United States Constitution Article 6, § 2	A-14
FTCA; 28 U.S.C. 1346(b); and 28 U.S.C. 2674	A-15
Louisiana Revised Statutes; 23:1032, 23:1061	A-16

TABLE OF AUTHORITIES

	PAGE
Bartholomae Corporation v. United States, 253 F.2d 716 (9th Cir. 1957)	12
Berry v. Holston Well Service, Inc., 488 So.2d 934 (La. 1986), Rehearing Denied (1986)	8
Cannon v. United States, 243 F.2d 71 (5th Cir. 1957)	12
Diamond v. Chakrabarty, 447 U.S. 303, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980)	10
Federal Tort Claims Act, 28 U.S.C. 1346(b), 28 USC 2674	i,3,4,7
Gomez v. United States, 246 F.2d 878 (7th Cir. 1957)	12
Hebert v. United States, 860 F.2d 607 (5th Cir. 1986)	9
Heckler v. Mathews, 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984)	10
Irvin v. United States, 148 F.Supp. 25 (D. S.D. 1957)	12
Jones v. United States, 241 F.2d 26 (4th Cir. 1957)	12
Knecht v. United States, 242 F.2d 929 (3rd Cir. 1957)	12
Leigh v. National Aeronautics and Space Administration, 860 F.2d 652 (5th Cir. 1988)	8

	PAGE
Louisiana Revised Statute 23:1032 and 23:1032	3,8
McNamara v. United States, 199 F.Supp. 879 (D. D.C. 1961)	12
Mandelbaum v. United States, 251 F.2d 748 (2nd Cir. 1958)	12
Massachusetts Bonding and Ins. Co. v. United States, 352 U.S. 128, 77 S.Ct. 186, 1 L.Ed.2d 189 (1956)	12
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), On Remand, 578 F.2d 565 (5th Cir. 1978)	11
Prima Paint Corp. v. Flood & Conklin Manufacturing Company, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)	10
Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962)	12
Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981)	10
Stewart Organization, Inc. v. Ricoh Corporation, 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988)	10
Supremacy Clause of the United States Constitution, Article VI	3

Tessier v. United States,
269 F.2d 305 (1st Cir. 1959) 12

United States v. Lee,
106 U.S. 196, 1 S.Ct. 240,
27 L.Ed. 171 (1882) 11

United States v. Locke,
471 U.S. 84, 105 S.Ct. 1785,
85 L.Ed.2d 64 (1985) 11

United States v. Mraz,
255 F.2d 115 (10th Cir. 1958) 12

United States v. Orleans,
425 U.S. 807, 96 S.Ct. 1971,
48 L.Ed.2d 390 (1976) 12

United States v. Rutherford,
442 U.S. 544, 99 S.Ct. 2470,
61 L.Ed.2d 68 (1979), On Remand,
616 F.2d 455 (10th Cir. 1980) 10

Valente v. United States,
264 F.2d 800 (6th Cir. 1959) 12

Youngstown Sheet & Tube Co.
v. Sawyer,
343 U.S. 579, 72 S.Ct. 863,
96 L.Ed.2d 1153 (1952) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO.:_____

TIMMY DALE GILTNER, LORI GILTNER AND
LIBERTY MUTUAL INSURANCE COMPANY
Petitioners

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Timmy Dale Giltner, Lori Giltner and Liberty Mutual Insurance Company pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS DELIVERED IN COURTS BELOW

I.

RULING ON MOTION [for Summary Judgment]. United States District Court for the Western District of Louisiana, Civil Action No. 87-0256-L, rendered on 16 February 1989. Appendix at A-1.

DENIED.

II.

RULING ON [reconsideration] MOTION FOR SUMMARY JUDGMENT. United States District Court for the Western District of Louisiana, Civil Action No. 87-0256-L, rendered 8 March 1989. Appendix at A-4.

III.

Ruling, APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, Fifth Circuit, No. 89-4230, rendered 25 January 1990. Appendix at A-6.

AFFIRMED.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit is dated 25 January 1990. The time of entry of said judgment was 25 January 1990.

The statutory provision which confers jurisdiction upon this Honorable Court to review the judgment in question by writ of certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES OF THE CASE

I.

The doctrine of Separation of Powers existing between the Legislative and Judicial branches of the United States Government, which doctrine is fairly implied by the distinct, purposeful division of those branches' limited powers delegated in Articles I and III, respectively, of the United States Constitution.

II.

The Supremacy Clause of the United States Constitution, Article VI, [2]. Verbatim text in Appendix at A-14.

III.

The Federal Tort Claims Act, 28 U.S.C. 1346(b); 28 U.S.C. 2674. Verbatim text in Appendix at A-15.

IV.

Louisiana Revised Statutes, 28:1032,1061. Verbatim text in Appendix at A-17.

STATEMENT OF THE CASE

Course of Proceedings Below

This case was brought by Timmy Dale Giltner and Lori Giltner naming the United States as defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), in the United States District Court for the Western District of Louisiana. Federal question jurisdiction, therefore, is conferred pursuant to 28 U.S.C. 1331, in that this case "[arises] under the ... laws ... of the United States." The United States' initial Motion for Summary Judgment was denied. Its Reconsideration Motion for Summary Judgment, however, was allowed based upon Fifth Circuit case law holding that **a government defendant** is to be treated differently than a private defendant. This latter grant of summary judgment was affirmed by the Fifth Circuit based on the same Fifth Circuit case law.

Facts

The plaintiff - petitioner, Timmy Dale Giltner was employed by Premier Construction, Inc. of New Iberia, Louisiana. Premier was upgrading the fire safety system at the Weeks Island Strategic Oil Reserve, which reserve is located in the underground salt dome south of New Iberia, Louisiana. The Reserve is owned by the United States Army as part of a fuel reserve system to be used in the event of an oil embargo or war. The United States had contracted with the approximately eight construction companies who were working at the Reserve. More specifically, the United States had a contract with Hobart Corporation to remove certain wire mesh from inside the facility, and Hobart had subcontracted with Premier to provide the manual labor therefore.

On February 1986, Mr. Giltner was carrying a steel plate in the facility when he tripped on a poorly secured piece of sheet iron on the catwalk. The sheet iron was sticking up at the base of a set of stairs

located in a dimly lit tunnel. When Mr. Giltner fell, the sheet iron he was carrying landed on his head, smashing his head between the steel plate and the steel steps, rendering him unconscious. He was rushed to the hospital where he was treated for head injuries.

Mr. Giltner was rendered totally and forever disabled as a result of the accident. He has undergone numerous brain scans, x-rays, and he is still undergoing extensive psychiatric evaluation and medical treatment. He requires constant medication and has been on total disability since the accident more than four years ago. In addition to the extreme pain and physical disablement, the fall has caused Mr. Giltner to suffer from severe personality disorders. He is married with three small children. His wife, friends and doctors will testify to the extreme change in his personality and physical condition since the accident causing the injury.

Argument

The decision of the United States Court of Appeals for the Fifth Circuit expressly distinguished **private** defendants from **Government** defendants in an action brought pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b). Appendix at A-10 through 11. This is in spite of the clear Congressional language that liability attaches to the United States for money damages caused by the wrongful acts or omissions of government employees acting within the scope of their employment **"under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"**, and **"in the same manner and to the same extent as a private individual under like circumstances"**. 28 U.S.C. 2674 See Appendix at A-16 for verbatim text of statutes. It is undisputed that the plaintiff-petitioner herein had a viable FTCA cause of action against the United States in tort had the United States been treated as a private person pursuant to state law. See Appendix at A-1 through 3.

Under Louisiana law, certain general contractors are insulated from tort liability from damages suffered by its subcontractor's employees when it is found that the subcontractor was performing work within the "trade, business or occupation" of the general contractor. La. R.S. 23:1032 and 1061. See appendix at A-17. The class of persons granted this "statutory employer" defense, however, is limited. ***Berry v. Holston Well Service, Inc.***, 488 So.2d 934 (La. 1986), rehearing denied (1986). Pursuant to the ***Berry*** decision, the district court below denied the United States' initial Motion for Summary Judgment which was based upon the "statutory employer" defense. Under the facts of this case, therefore, the controlling state law defense - La. R.S. 23:1032 and 1061 as limited by ***Berry*** - holds that a private person would be liable to the petitioner. See appendix at A-1 through 3. The Fifth Circuit refused to apply ***Berry*** to this case, preferring instead to fashion its own test which treats a United States defendant **different** than a private defendant. See decision

of the Fifth Circuit, Appendix at A-6 through 12; see also ***Leigh v. National Aeronautics and Space Admin.***, 860 F.2d 652 (5th Cir. 1988); ***Hebert v. United States***, 860 F.2d 607 (5th Cir. 1986).

The Fifth Circuit Panel below followed existing Fifth Circuit precedent, ***Lee, supra, Hebert, supra***, which precedent is in direct conflict with the express language of the FTCA. The Fifth Circuit's acknowledged documented refusal to apply Congress' clear, express language found in the FTCA - which language requires that the liability of the United States in tort be **the same** as that of a private person under the state law where the accident occurred, id. - is a violation of the constitutional doctrine of the Separation of Powers between the legislative and judicial branches of the federal government. Just as "[w]hen the president takes measure incompatible with the expressed or implied will of Congress, his power is at its lowest ebb ... and the Courts can sustain ... such only by disabling the Congress [by holding the Congressional act unconstitutional] from acting upon

the subject," ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), so too is the power of the federal judiciary at it lowest ebb when its acts incompatibly with the express will of Congress. Such act by the Court can only be sustained if Congress has acted unconstitutionally.

> If Congress intended to reach the issues before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "[f]ederal courts are bound to apply rules enacted by Congress with respect to matters ... over which it has legislative power." ***Stewart Organization, Inc. v. Ricoh Corp.,*** 487 U.S. 22, 108 S.Ct. 2239, 2242, 101 L.Ed. 2d 22 (1988), quoting ***Prima Paint Corp. v. Flood & Conklin Mfg. Co.,*** 388 U.S. 395, 406, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967).

See also, ***Heckler v. Mathews,*** 465 U.S. 728, 741, 742, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984); ***Schweiker v. Wilson,*** 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); ***Diamond v. Chakrabarty,*** 447 U.S. 303, 315, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980); ***United States v. Rutherford,*** 442 U.S. 544, 551, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979), on remand, 616 F. 2d 455 (10th Cir. 1980);

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), on remand, 578 F.2d 565 (5th Cir. 1978); ***United States v. Locke,*** 471 U.S. 84, 95, 96, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985).

Since the rule of federal sovereign immunity is based upon **common**, not constitutional law, ***United States v. Lee,*** 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882), no constitutional act may be inferred by Congress' creation of federal sovereign liability via the FTCA. The District Court and the Court of Appeals have therefore overstepped their constitutional bounds by interfering with the legislative function delegated solely to the Congress.

Moreover, the Fifth Circuit's decision below is in direct conflict with **all** published Circuit Court and **all** United States Supreme Court decisions on point which hold that the liability of the United States as a defendant in a FTCA case is determined by state law as if the United States were a private person.

Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); ***United States v. Orleans,*** 425 U.S. 807, 812, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); ***Massachusetts Bonding & Ins. Co. v. United States,*** 352 U.S. 128, 129, 77 S.Ct. 186, 1 L.Ed.2d 189 (1956); ***Tessier v. United States,*** 269 F.2d 305 (1st Cir. 1959); ***Mandelbaum v. United States,*** 251 F.2d 748 (2nd Cir. 1958); ***Knecht v. United States,*** 242 F.2d 929 (3rd Cir. 1957); ***Jones v. United States,*** 241 F.2d 26 (4th Cir. 1957); ***Cannon v. United States,*** 243 F.2d 71 (5th Cir. 1957); ***Valente v. United States,*** 264 F.2d 800 (6th Cir. 1959); ***Gomez v. United States,*** 246 F.2d 878 (7th Cir. 1957); ***Irvin v. United States,*** 148 F.Supp. 25 (D. S.D. 1957); ***Bartholomae Corp. v. United States,*** 253 F.2d 716 (9th Cir. 1957); ***United States v. Mraz,*** 255 F.2d 115 (10th Cir. 1958); ***McNamara v. United States,*** 199 F.Supp. 879 (D. D.C. 1961).

Conclusion

Even if the writ of certiorari does not issue on constitutional grounds, it should issue because of the Fifth Circuit's refusal to follow Supreme Court decisions in violation of the doctrine of stare decisis and because the Fifth Circuit's decision conflicts with all other federal circuits on this issue.

Respectfully submitted,

BY: _____

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PAULA COBB - Bar Roll # 4214
Counsel for Petitioner
Timmy Dale Giltner

BY: _____

EDWARD C. ABELL, JR. - # 2284
Counsel for Petitioner
Liberty Mutual Insurance Company

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared, ARTHUR COBB, who after being duly sworn did depose and say that the allegations of the Petition for Writ of Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same have been mailed to William J. Flannagan and The Solicitor General, Department of Justice on the __ day of May 1990.

_____
ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on __ May 1990.

_____
NOTARY PUBLIC

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, personally came and appeared, EDWARD C. ABELL, JR., who after being duly sworn did depose and say that the allegations of the Petition for Writ of Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same have been mailed to William J. Flannagan and The Solicitor General, Department of Justice on the __ day of May 1990.

_____
EDWARD C. ABELL, JR.

SWORN TO AND SUBSCRIBED before me on _ May 1990.

_____
NOTARY PUBLIC

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

TIMMY DALE GILTNER, et ux	CIVIL ACTION
versus	No. 87-0256-L
UNITED STATES OF AMERICA	JUDGE PUTMAN

RULING ON MOTION

Now before the Court for decision is the motion by defendant, United States of America ("the Government") for summary judgment.

This is an action for personal injuries by plaintiff Timmy Dale Giltner and his wife against the Government under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671, et seq.

Plaintiff Giltner allegedly suffered an accident and injuries when he tripped and fell at the Strategic Petroleum Reserve located at Weeks Island, Louisiana, which facility is owned by the Government.

The Government argues that it was the statutory employer of plaintiff under the Louisiana Workman's Compensation Law LSA-R.S. 23:1032 and 1061, and, as such, cannot be sued in tort by plaintiff.

At the time of the accident, plaintiff was employed by Premier Construction, Inc. which was engaged in upgrading the fire safety system at the Weeks Island Reserve. The Government had contracted out to the Boeing Corporation, which subcontracted out to the Hobart Corporation, which, in turn, subcontracted out to plaintiff's employer, Premier Construction, Inc.

Plaintiff argues that he was not the statutory employee of the Government; that the facts presented by the Government in support of its motion for summary judgment are insufficient to establish the Government's right to summary judgment; that plaintiff's and his employer Premier's occupation was specialized per se and, therefore, not a part of the trade, business or occupation of the Government.

Without here going into a detailed discussion of the facts as interpreted by each of the parties, which would serve no useful purpose at this preliminary state of litigation, it is obvious to the Court, after reviewing the excellent memoranda of counsel for both parties and the entire record herein, that there are genuine issues of

material fact to be resolved by the Court at the trial herein relating to whether the Government was the statutory employer of plaintiff.

In accordance with the foregoing, we must deny the Government's motion for summary judgment.

IT IS SO ORDERED.

Lafayette, Louisiana, this 16th day of February, 1989.

_____

United States Senior District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

TIMMY DALE GILTNER, et ux	CIVIL ACTION
versus	NO. 87-0256-L
UNITED STATES OF AMERICA	JUDGE PUTMAN

RULING ON MOTION FOR SUMMARY JUDGMENT

We have given defendant's motion for summary judgment further consideration, and in keeping with our helding in Bergeron v. United States, 495 F. Supp. 222 (W.D. LA 1980), a case involving a death which occurred at the Est Hackberry strategic oil reserve storage site, the United States is clearly entitled to a "Section 6" defense, LSA-R.S. 23:1061, under the Louisiana Workman's Compensation Act. See: Leigh v. National Aeronautics And Space Admin., 860 F. 2d 652 (5th. Cir. 1988); Hebert v. U.S., 860 F. 2d 607 (5 Cir. 1986); Thomas v. Calavar Corp., 679 F. 2d 416 (5th Cir. 1982); Klohn v. Louisiana Power & Light, 406 So. 2d 577 (LA 1981).

It is accordingly ORDERED AND DECREED that the defendant's Motion for Summary Judgment filed January 11, 1989 be and the same is hereby granted and the claims of Timmy Dale Giltner and his wife, Lori Giltner, be and they are hereby dismissed, and with prejudice.

Lafayette, Louisiana, March 8, 1989.

United States Senior District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-4230

TIMMY DALE GILTNER, ET AL.,
Plaintiffs-Appellants,
LIBERTY MUTUAL INSURANCE
Co.,
Intervenor-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CV 87-0256)

(January 25, 1990)

Before THORNBERRY, JOHNSON, and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge.

Timmy Dale and Lori Giltner appeal the district court's entry of summary judgment in favor of the United States in this Federal Tort Claims Act suit. We affirm.

I

Timmy Dale Giltner was severely injured while working for his employer, Premier Construction, Inc., at the Weeks Island Strategic Oil Reserve in New Iberia, Louisiana. The Weeks Island facility is owned by the United States for use as an emergency oil reserve. The United States Department of Energy, which is responsible for the construction, operation, and management of the Weeks Island facility, contracted with the Boeing Corporation, which subtracted with Hebert Corporation, which in turn subcontracted with Premier, to furnish and install wire mesh around the facility. Giltner was injured while working in one of the facility's underground salt caverns.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

The Giltners brought suit against the United States pursuant to the Federal Tort Claims Act ("FTCA"), alleging that the United States was negligent in maintaining the facility. Applying Louisiana Law, as interpreted by this court, the district court dismissed the complaint on the ground that the United States was "clearly entitled" to a statutory employer defense under the Louisiana worker's compensation laws. The Giltners appeal.

II

The FTCA permits recovery in tort against the United States only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). Under Louisiana law, the principal for whom a contractor is performing work is not liable for negligent injuries suffered by the contractor's employees if the work contracted out is part of the principal's "trade, business, or occupation." In such circumstances, the

principal is deemed to be the "statutory employer" of the injured employee, whose sole remedy is under Louisiana's worker's compensation law. La. Rev. Stat. Ann. §§ 23:1032, 23:1061 (West 1985).

In Thomas v. Calavar Corp., 679 F.2d 416, 418-19 (5th Cir. 1982), this court held that, under Louisiana law, the proper test for determining whether the government qualifies as a statutory employer is whether the plaintiff was injured while doing work that was part of the "trade, business, or occupation" of the government. Four years later, in Berry v. Holston Well Service, Inc., 488 So.2d 934 (La. 1986),[1] the Louisiana Supreme Court narrowed the category of statutory employers. The court held that a principal may assert the statutory employer defense against a subcontractor's employee only if the contract work "is,

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[1]The Louisiana Legislature recently amended the worker's compensation law and legislatively overruled Berry. See Act 454, § 3, 1989 Regular Legislative Session, effective January 1, 1990.

in that business, normally carried on through employees rather than independent contractors." 488 So.2d at 938. The principal, in order to establish that work is normally carried on by employees, must show that the work is: (1) nonspecialized; (2) a part of the principal's trade, occupation, or business; and (3) being carried on by the principal at the time of the injury. Id. Thus, Berry shifted the focus of the Section 23:1061 inquiry from whether the defendant's contractor was performing part of the defendant's trade, business, or occupation, to whether the plaintiff's work was specialized." Leigh v. National Aeronautics & Space Administration, 860 F.2d 652, 653 (5th Cir. 1988).

This court has previously held that Berry's more stringent definition of a statutory employer does not apply when a governmental entity is the employer. See Leigh, 860 F.2d at 653; Hebert v. United States, 860 F.2d 607, 608 (5th Cir. 1984). According to our decisions in Leigh and Hebert, the proper definition of

statutory employer for government entities is the broader "trade, business or occupation" test of Thomas v. Calavar Corp., 679 F.2d 416, 418-419 (5th Cir. 1982) (construing Klohn v. Louisiana Power & Light, 406 So2d 577 (La. 1981)). The district court followed Leigh and Hebert and held that Giltner's tort claims were precluded because the Department of Energy was Giltner's statutory employer under Louisiana law.

The Giltners contend that this circuit has not correctly interpreted Louisiana law with respect to the proper test for determining if the government qualifies as a statutory employer, arguing that the Berry test applies to determine statutory employer status of the government, just as it does to determine that of private employers. Furthermore, the Giltners argue that the FTCA preempts Louisiana law to the extent that Louisiana law treats governments in a manner different from the way it treats "private individuals.." We can give the Giltners' arguments little consideration because we are bound by this court's earlier decisions in

Leigh and Hebert, both of which involved facts substantially similar to those in this case. We agree with the district court that Giltner was performing work that was part of the United States' business, authorized by statutory mandate, a point that Giltner does not contest on appeal. The United States was therefore Giltner's statutory employer under Louisiana worker's compensation law, and, under our established precedent, is shielded from tort liability to Giltner for his work-related accident.

The judgment of the district court is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4230

TIMMY DALE GILTNER, ET AL.,
Plaintiffs-Appellants,
LIBERTY MUTUAL INSURANCE CO.,
Intervenor-Appellant,
versus
UNITED STATES OF AMERICA,
Defendant-Appellee.

- - - - -

Appeal from the United States District Court
for the Western District of Louisiana

- - - - -

ORDER:

IT IS ORDERED that appellant's motion for hearing en banc is denied.

UNITED STATES CIRCUIT JUDGE

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 § 1346 DISTRICT COURTS; JURISDICTION Part 4

§ 1346. United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense

based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

§ 1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer for principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment; and 2) to the liability of any partner in a partnership which as been formed for the purpose of evading any of the provisions of this Section.

Amended by Acts 1976, No. 147, § 1.

SCOPE AND OPERATION

Ch. 10

§ 1061. Principal contractors: liability

Where any person (in this section referred to as principal) undertaker to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him: and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for

reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.

No. 89-1828

In the Supreme Court of the United States

OCTOBER TERM, 1990

TIMMY DALE GILTNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the United States was not liable under the Federal Tort Claims Act for injuries suffered by an employee of a subcontractor working on a government facility because, under Louisiana's workers' compensation law, the United States was a "statutory employer" of the injured worker.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Berry v. *Holston Wells Service, Inc.*, 488 So.2d 934 (La. 1986)	3, 4, 5
Bowen v. *Massachusetts*, 487 U.S. 879 (1988)	5
Chaline v. *United States*, 887 F.2d 505 (5th Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990)	4
Crider v. *United States*, 885 F.2d 294 (5th Cir. 1989), cert. denied, 110 S. Ct. 2561 (1990)	7
Doggett v. *United States*, 858 F.2d 555 (9th Cir. 1988)	7
Ewell v. *United States*, 776 F.2d 246 (10th Cir. 1985)	6
Frisby v. *Schultz*, 487 U.S. 474 (1988)	5
Hebert v. *United States*, 860 F.2d 607 (5th Cir. 1986)	3, 5
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955)	6
Klohn v. *Louisiana Power & Light*, 406 So.2d 577 (La. 1981)	4
Leigh v. *NASA*, 860 F.2d 652 (5th Cir. 1988)	3
Louie v. *United States*, 776 F.2d 819 (9th Cir. 1985)	7
Raymer v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982)	6
Rayonier, Inc. v. *United States*, 352 U.S. 315 (1957)	6

Cases – Continued: Page

Thomas v. *Calavar Corp.*, 679 F.2d 416 (5th Cir. 1982) 3, 4
United States v. *Muniz*, 374 U.S. 150 (1963) 6

Statutes:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 1, 3, 6
28 U.S.C. 2671-2680 1
28 U.S.C. 2674 6
La. Rev. Stat. Ann. § 23:1061 (West 1985 & Supp. 1990) 2, 5

Miscellaneous:

1 L. Jayson, *Handling Federal Tort Claims* (1989 & Supp. 1990) 6, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A12) is unpublished, but the decision is noted at 894 F.2d 1334 (Table). The opinions of the district court (Pet. App. A1-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1990. The petition for a writ of certiorari was filed on April 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, petitioners seek damages from

the United States for injuries that petitioner Timmy Dale Giltner sustained while working at the Weeks Island Strategic Oil Reserve in New Iberia, Louisiana. The Weeks Island facility is owned by the United States for use as an emergency oil reserve. The United States contracted with Boeing Petroleum Service for the operation and maintenance of the facility. Boeing subcontracted with Hobart Corporation to perform work on wire mesh at the facility. Hobart, in turn, subcontracted with Premier Construction, Inc. to provide manual labor for the job. Giltner was employed by Premier. Pet. App. A7.

Giltner was seriously injured when he tripped on a piece of sheet iron and fell while working in one of the facility's underground caverns. Giltner and his wife, petitioner Lori Giltner, brought this action against the United States under the FTCA, alleging that his injuries were attributable to the government's negligent maintenance of the Weeks Island facility. Pet. App. A7-A8.

2. The government moved for summary judgment, arguing that under Louisiana's workers' compensation law the United States was Giltner's "statutory employer" and, consequently, was not liable in tort for his injuries.[1] The district court initially denied the motion, finding that there were disputed issues of fact material to the question

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[1] Under Louisiana's workers' compensation law, workers' compensation benefits are an injured worker's exclusive remedy against his employer. When a principal contracts with an independent contractor for the performance of work that is part of the principal's business, the principal is—under circumstances discussed further below—deemed an employer of the contractor's employees. La. Rev. Stat. Ann. § 23:1061 (West 1985 & Supp. 1990). See Pet. App. A8-A12, A18-A21. (As noted below, the amendment to the statute enacted in 1989 is not effective with respect to this case.)

The defense that these provisions afford to a principal is commonly referred to as the "statutory employer defense."

whether the United States was Giltner's statutory employer. Pet. App. A1-A3. However, upon reconsideration, the district court granted the motion. Referring to Fifth Circuit decisions applying the statutory employer defense in FTCA cases, the district court held that "the United States [was] clearly entitled to" that defense on the facts of this case. *Id.* at A4.

3. In an unpublished decision, the court of appeals affirmed. Pet. App. A6-A12. The court noted that the FTCA "permits recovery in tort against the United States only 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' " *Id.* at A8 (quoting 28 U.S.C. 1346(b)). Under Louisiana law, the court continued, "the proper test for determining whether the government qualifies as a statutory employer is whether the plaintiff was injured while doing work that was part of the 'trade, business, or occupation' of the government." Pet. App. A9 (citing *Thomas* v. *Calavar Corp.*, 679 F.2d 416, 418-419 (5th Cir. 1982)). Although it recognized that the Louisiana Supreme Court had "narrowed the category of statutory employers" in *Berry* v. *Holston Well Service, Inc.*, 488 So. 2d 934 (La. 1986), the court of appeals adhered to prior Fifth Circuit decisions holding that the *Berry* test was inapplicable as a matter of state law to governmental entities. Pet. App. A9-A10 (citing *Hebert* v. *United States*, 860 F.2d 607, 608 (5th Cir. 1986) (per curiam); *Leigh* v. *NASA*, 860 F.2d 652, 653 (5th Cir. 1988)). Finding that the district court had properly applied those precedents to this case, the court of appeals affirmed. Pet. App. A11-A12.

ARGUMENT

This is the most recent in a series of cases in which the Fifth Circuit has concluded that Louisiana's statutory em-

ployer defense bars an FTCA action against the United States by an individual injured while working for a government contractor on a government project. See *Hebert* v. *United States, supra*; *Leigh* v. *NASA, supra*; *Chaline* v. *United States*, 887 F.2d 505 (1989), cert. denied, 110 S. Ct. 1115 (1990). In each of these cases, the court of appeals has held that the United States' liability should be determined by reference to state-law standards governing the availability of the statutory employer defense to governmental entities. Last Term, in *Chaline*, this Court denied a petition for certiorari seeking review of the question whether the United States' liability should instead be judged by reference to the standard for private employers. The petition in this case presents the same question. For reasons similar to those we advanced in *Chaline*, further review is unwarranted.

1. Before the *Berry* decision, a single standard governed the availability of the statutory employer defense to both private and governmental entities in Louisiana. In cases in which an employee of a contractor was injured while working on a public or private project, the issue was whether the worker "was injured while doing work that is part of the 'trade, business, or occupation' " of the principal. *Thomas* v. *Calavar*, 679 F.2d at 419. See *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577 (La. 1981). However, in *Berry*, a case brought by an injured worker against a private principal, the Supreme Court of Louisiana announced a "three level analysis" governing the availability of the statutory employer defense. 488 So. 2d at 937. The "central question" under *Berry* is "whether the contract work is specialized or non-specialized." If the work is specialized, the statutory employer defense is unavailable to the principal; if not, the availability of the defense depends on whether the contract work "can be considered a part of the principal's trade, business, or

occupation" and whether "the principal is engaged in the work at the time of the alleged accident." *Id.* at 938-939.

The Fifth Circuit has determined that as a matter of state law the standards announced in *Berry* do not apply to cases in which the principal is a governmental entity. As the court explained in *Hebert* v. *United States*, 860 F.2d at 608, *Berry* "does not modify the rule of [*Klohn*] or [*Thomas*], which analyze the statutory employer status of government entities." The court of appeals adhered to that understanding of Louisiana law in this case.[2]

In a recent amendment to Louisiana's workers' compensation law, the Louisiana legislature has overruled *Berry* and effectively restored a single test governing the availability of the statutory employer defense to all employers. As amended, the workers' compensation statute now provides, with respect to cases arising after January 1, 1990 (La. Rev. Stat. Ann. § 23:1061 (West Supp. 1990)):

> The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether

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[2] As petitioners appear to acknowledge, the correctness of the Fifth Circuit's construction of state law presents no question calling for this Court's review. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to * * * regional courts of appeals in matters that involve the construction of state law."); *Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988) ("Following our normal practice, 'we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.' ").

> the principal has the equipment or manpower capable of performing the work.

This new provision is not applicable to petitioners' claim, which arose prior to the amendment's January 1, 1990, effective date. Nevertheless, this modification of Louisiana's workers' compensation scheme deprives the question presented by the petition of any prospective importance.

2. The Federal Tort Claims Act permits suit against the United States for injuries caused by the negligence of federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). See 28 U.S.C. 2674 ("United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances"). In several decisions, this Court has made clear that these provisions preclude the federal government from arguing that it is not liable for "uniquely governmental" activities not performed by private parties and from invoking governmental immunities conferred by States on state and local governmental entities. *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *Indian Towing Co* v. *United States*, 350 U.S. 61, 64-68 (1955); *United States* v. *Muniz*, 374 U.S. 150, 159, 164 (1963). In general, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Rayonier, Inc.* v. *United States*, 352 U.S. at 319. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ewell* v. *United States*, 776 F.2d 246, 248-249 (10th Cir. 1985). See generally 1 L. Jayson, *Handling Federal Tort Claims* §§ 217.01-217.03 (1989 & Supp. 1990).

Nevertheless, the courts of appeals have sometimes referred to state law rules applicable to state governmental entities to determine the extent of the United States' liability under the FTCA. In *Louie* v. *United States*, 776 F.2d 819, 825 (1985), for instance, the Ninth Circuit concluded that the federal government's liability for an allegedly negligent failure by military police to restrain an intoxicated serviceman "rests properly on an examination of the liability of the state or a municipality under like circumstances." See *Crider* v. *United States*, 885 F.2d 294, 296 (5th Cir., 1989), cert. denied, 110 S. Ct. 2561 (1990) (following *Louie*); *Doggett* v. *United States*, 858 F.2d 555, 561 (9th Cir. 1988) (where "unique governmental functions" are involved, court seeks "to determine what liability state law attaches to * * * analogous entities subject to its jurisdiction").[3] The rationale of these decisions appears to be that when a State has exposed governmental entities to suit, a court may properly refer to laws defining the extent of their liabilities for the purpose of determining the scope of the United States' FTCA liability.

In our view, this is not an appropriate case in which to consider the question of when, if ever, a federal court may refer to state-law rules applicable to governmental entities in determining the extent of the United States' liability under the FTCA. Unlike *Indian Towing, Rayonier*, and *Muniz*, this is not a case in which the federal government is relying on the absence of equivalent private activity or invoking immunity granted by a State to its governmental entities—limitations on liability that, this Court has determined, Congress meant to relinquish in the Federal Tort Claims Act. Rather, as the Fifth Circuit has read Louisiana

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[3] See generally 1 L. Jayson, *supra*, § 217.02 (collecting cases in which courts have referred to standards governing municipal liability to determine federal government's liability under the FTCA).

law, Louisiana's workers' compensation scheme drew a distinction (from the time of the *Berry* decision until the recent amendment of the statute) between public and private entities with respect to injuries to employees of contractors. Such a distinction could rationally be based on intrinsic differences between the contracting activities of governmental and private entities or on policy considerations regarding the relative merits of the workers' compensation remedy and tort liability in the private and public sectors. The application of the Federal Tort Claims Act in that kind of situation presents a novel question. We are unaware of any decisions by courts outside the Fifth Circuit addressing the same or a comparable issue.[4] Moreover, as noted above, Louisiana's recent amendment to its workers' compensation law has mooted the issue as to claims arising after January 1, 1990. Under these circumstances, further review is not warranted.

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[4] None of the cases cited in the petition (Pet. 11-12) involved a situation in which the court isolated separate rules for private and governmental entities and chose to apply the latter in determining the United States' liability under the FTCA. Rather, those cases stand for the unexceptional principle that issues of liability and scope of employment must be resolved by reference to state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990—262 203/20022